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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 675

JACK HANRATTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 7-10; R. 311-314) is reported at 218 F. 2d 358.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1955 (R. 315) and a petition for rehearing was denied on February 24, 1955 (R. 320). The petition for a writ of certiorari was filed on March 26, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment was invalid and the conviction after trial by jury vitiated because pursuant to Texas law women were excluded from service on the grand and petit juries concerned.

2. Whether the evidence was sufficient to support petitioner's conviction.

CONSTITUTIONAL PROVISION, STATUTE AND FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Article 16, Section 19 of the Texas Constitution provides:

> The legislature shall prescribe by law the qualification of grand and petit jurors.

Article 2133, Vernon's Annotated Civil Statutes of Texas provides:

> All men over twenty-one years of age are competent jurors, unless disqualified under some provision of this chapter. No man shall be qualified to serve as a juror who does not possess the following qualifications: * * *

Rule 12(b)(2), F. R. Crim. P., provides:

> *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such de-

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fense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

STATEMENT

Petitioner and codefendants Albert Granato and Ellen Pool were convicted under a two-count indictment which charged transportation of a forged cashier's check in interstate commerce and conspiracy to commit such offense (R. 1-3, 25). Petitioner was sentenced generally to a term of imprisonment for five years (R. 32). On appeal the judgment of conviction was affirmed (R. 315).

The check in question was a forged cashier's check for $400 dated May 3, 1953, payable to one William R. Thayer, which showed the First National Bank, Tulsa, Oklahoma, as the issuing bank (Gov. Ex. 1, R. 274). It closely resembled cashier's checks issued by Alamo National Bank of San Antonio, Texas [Alamo], where it was cashed (R. 55), carried the same clearing house number, had the amount of the check stamped in by a check protector, and the signature handwritten (cf. Ex. 1, R. 274 and Ex. 9, R. 284; R. 56, 61-62, 105).

The evidence in support of the verdict may be summarized as follows:

Petitioner was the owner of a tavern which Miss Pool and Granato, a friend of 20 years' standing,

frequented (R. 115, 237). In March or April 1953, petitioner unsuccessfully approached Lucille Scoggin and Betty Davis, employees of Alamo, to bring him some blank cashier's checks (R. 100-101, 108, 119, 138). A few weeks later petitioner gave Miss Scoggin a package of blank checks which purported to be cashier's checks of the First National Bank of Tulsa, and which had been printed by a local printer (Ex. 10, R. 285, R. 74-76, 102). He told her to prepare fictitious checks from them in the amount of approximately $3,000 so that he could use them as a "flash" during the baseball season (R. 102, 110). From this package, Miss Scoggin prepared about 8 to 10 checks (R. 103). She dated the checks with Alamo's rubber stamp, typed on the right the amounts which varied from $200 to $400, made them payable to one Thayer who was purely a fictitious person, and signed a fictitious name as exchange teller (R. 103-104, 105). She returned the checks in this condition to petitioner without signing the name of the vice-president and without printing by machine the amounts thereon (R. 105, 106, 109). Among those prepared by her and returned to petitioner was the check described in the indictment (R. 103-104).

About this time petitioner had one of his employees procure a check protector which he put in the kitchen of his tavern (R. 114-116). He also had two cashier's checks payable to him purchased at different banks (Ex. 8 and 9, R. 283, 284; R. 118). Thereafter petitioner and Granato spent an unusually long time in the kitchen together (R. 117, 129, 132).

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Toward the end of May 1953 (R. 137-138, 139), when Miss Davis, Miss Pool and Granato were together, Granato asked Miss Davis if she could identify false cashier's checks and told her that he had four of them in various amounts, one of them for $400. When Miss Davis told him that cashier's checks were usually mechanically signed, Granato said that his checks were signed by hand. (R. 137-138.)

Granato showed the check at a local barbershop and unsuccessfully attempted to use it to cover a bet for petitioner on a forthcoming heavyweight fight (R. 158-159, 160, 166, 167-168, 239).

About a week later, on June 5, 1953, at the bank Miss Pool showed Miss Davis the check described in the indictment and told her that Granato had given it to her. Miss Davis said that because it was not machine signed, it was not 'good", but Miss Pool said she would have one of the tellers at the bank cash it for her. (R. 139-140.) Miss Pool succeeded in cashing the check through a teller and gave $40 to Miss Davis for her rent (R. 67-68, 140-141).

In due course the check was mailed to the purported issuing bank, First National Bank and Trust Company, Tulsa, Oklahoma, since there was no First National Bank in Tulsa (R. 48, 51, 53, 55). It was there that the forgery was discovered (R. 47, 52). The check was endorsed by Elizabeth Pool and "William R. Thayer" (Ex. 1, R. 274, 68-69, 71). The Thayer signature was never identified (R. 191, 199), but by comparing that signature with specimens of Granato's writing, the F. B. I. could

not conclude that it was not Granato's writing (R. 191, 200). Petitioner's handwriting was not compared with the Thayer signature (R. 200).

After Miss Pool cashed the check Granato, who had no visible means of support, gave $140 as payment on a Hudson automobile (R. 173-174, 180-181, 251).

At the close of the government's case petitioner unsuccessfully moved for a directed verdict (R. 9-10).

The final charge to the jury included the following (R. 17):

> This case rests on circumstantial evidence.
>
> A conviction may be had upon circumstantial evidence as well as upon direct evidence. It is not necessary for you to have testimony of some person who can swear he saw the thing done in order for you to find it was done. You can infer the doing of a thing from circumstantial evidence as well as from direct evidence, provided the circumstances are strong enough. However, in arriving at a verdict of guilty upon circumstantial evidence the circumstances must be consistent with each other and must be consistent with the idea of guilt and must exclude every other reasonable hypothesis or if you believe, or have a reasonable doubt thereof, the circumstance to be as consistent with innocence as with guilt, it is your duty and you must acquit the defendants.

By a motion to arrest judgment, petitioner unsuccessfully challenged the composition of the

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grand and petit juries in this case because of the fact that, pursuant to Texas law, women were not called for jury service (R. 26-28).

ARGUMENT

1. Petitioner contends that he was denied a fair and impartial jury trial because pursuant to Texas law women were excluded from the grand jury which indicted him and the petit jury which convicted him. But petitioner misconceives this Court's decision in *Ballard* v. *United States*, 329 U. S. 187 (Pet. 5). There is no constitutional rule or policy requiring women to be placed on jury lists. See *Glasser* v. *United States*, 315 U. S. 60, 65; *Ballard* v. *United States*, 329 U. S. at 199, 204 (dissenting opinions). The basis for the decision in *Ballard* holding that the all male jury therein was illegally constituted was "the purposeful and systematic exclusion of women from the panel" in a state [California] which specifically made women eligible for jury service. It was this "departure from the statutory scheme" which was condemned. 329 U. S. at pp. 193, 195. Admittedly (Pet. 5), no such departure from the statutory scheme is here involved. To the contrary, the statute governing the selection of juries in Texas limited the lists to men.[1] Art. 2133, Vernon's Annotated Civil Statutes of Texas. As the court of appeals held (Pet.

[1] To a degree state law is determinative of the qualifications of federal jurors. By 28 U.S.C. 1861, Congress provided that citizens of the United States over 21 years of age can serve as federal jurors unless "incompetent to serve as a grand or petit juror by the law of the State in which the district court is held."

App. 9-10), petitioner was not deprived of any procedural right either under the statute or the constitution. *Quinones* v. *United States*, 161 F. 2d 79 (C. A. 1), certiorari denied, 331 U. S. 833; *Johnson* v. *Sanford*, 167 F. 2d 738 (C. A. 5); *Martin* v. *United States*, 166 F. 2d 76 (C. A. 4).

Moreover, petitioner's challenge to the composition of the grand and petit juries, made for the first time after trial and verdict, and in the absence of good cause shown for the delay, came too late. Rule 12(b)(2), F. R. Crim. P.; *Frazier* v. *United States*, 335 U. S. 497; *Agnew* v. *United States*, 165 U. S. 36; cf. *Ballard* v. *United States*, *supra*, at 190.

2. Petitioner attacks (Pet. 5-6) the sufficiency of the evidence to support his conviction, apparently on the ground that the circumstantial evidence was not inconsistent with every reasonable hypothesis of innocence. But the rule requiring the exclusion of every hypothesis but that of guilt is at most an instruction which may be given to the jury, as it was here (*supra*, p. 6), and is in no sense a standard of appellate review. Cf. *Holland* v. *United States*, 348 U. S. 121, 139. In this case, as the court below held (Pet. App. 9): "There was abundant circumstantial evidence of a conspiracy and actual commission of the substantive crime by the appellants." Further review by this Court of the sufficiency of the evidence to sustain the verdict is not called for.

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CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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